

SUPERIOR COURT  
OF THE  
STATE OF DELAWARE

E. SCOTT BRADLEY  
*JUDGE*

SUSSEX COUNTY COURTHOUSE  
1 The Circle, Suite 2  
GEORGETOWN, DE 19947

April 13, 2006

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**RE: Cheryl Bunting v Citizens Financial Group, Inc., et al.**  
**05C-03-013-ESB**

Date Submitted: March 30, 2006

Dear Counsel:

This is my decision on the motions for partial summary judgment filed by Plaintiff Cheryl Bunting (“Bunting”) and Defendants Citizens Financial Group, Inc. and Citizens Bank (collectively, “Citizens”). Citizens operates branch banks in Delaware and other states. Bunting worked at Citizens’ branch bank in Georgetown, Delaware. Citizens fired Bunting because she did not follow Citizens’ written notary policy when she notarized the signatures on a customer’s mortgage. After Bunting was fired, she filed suit against Citizens alleging a wage claim (Count I), a wrongful termination claim (Count II), and a breach of the duty of good faith and fair dealing claim (Count III). Bunting has moved for summary judgment on Count I. Citizens has moved for summary judgment on Counts II and III.

**STATEMENT OF FACTS**

Bunting worked for Citizens and its predecessors-in-interest for 26 years. She started as a teller and was an assistant branch manager and acting branch manager at Citizens’ retail branch bank in

Georgetown, Delaware when she was fired by Denise Burton (“Burton”) and Lee Walls (“Walls”), a regional manager and acting regional manager, respectively, on October 29, 2004.

Bunting was fired for violating Citizens’ written notary policy.<sup>1</sup> She notarized a customer’s signature on a mortgage, but did not see the customer and his wife sign the mortgage. The mortgage was given to Bunting to notarize by John Craig (“Craig”), a Citizens’ relationship manager. Craig took the loan documents, which included a mortgage, to a long-standing customer, a local doctor, who was too busy to come to the bank to sign documents that were part of a home equity loan. Craig left the documents at the doctor’s office and returned the next day and retrieved them. Craig did not see either the doctor or his wife sign the documents, but based on having seen their signatures in the past, he believed the signatures to be genuine. He brought the documents back to the bank and gave them to Bunting to be notarized and processed. An issue later arose regarding whether the documents had been signed by the wife. Between the time the mortgage was signed and when the issue of the propriety of the wife’s signature arose, the husband and wife became estranged. The wife refused to re-sign the documents, questioned the validity of her signature and asked Citizens to confirm that the debt was that of her husband alone. When Citizens learned that Bunting notarized the signatures without having seen the doctor and his wife place them on the mortgage, Citizens terminated Bunting

The practice Bunting engaged in occurred with some frequency and constituted acceptable bank policy at the branch in Georgetown, Delaware. Both Walls and Burton, Bunting’s supervisor and his supervisor, respectively, and others had asked Bunting to notarize documents outside the presence of

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<sup>1</sup>The written policy provides, in part, that: Notaries must personally witness the signature before them. Notaries can never notarize documents unless the signer personally appears before the notary and either signs or acknowledges the signature. If a branch notary is asked to notarize a document without the customer being present, or you witness such act, report this violation to policy (sic) to your management or to the Citizens Bank Alertline at 1-800-700-1107.

the signor under “different circumstances.” The “different circumstances” apparently consisted of situations in which the person who asked Bunting to notarize the document could vouch for the authenticity of the signature, just as Bunting believed to be the case when Craig asked her to notarize the mortgage in this case. Other employees had also asked other notaries in the Georgetown branch to notarize signatures on documents that the notaries had not witnessed.

Although the practice of notarizing documents as Bunting did in connection with the loan transaction in this case was long-standing, widespread and condoned by both Bunting’s supervisor, Walls, and his supervisor, Burton, the practice was not considered when Dennis Ferretti, Citizens Financial Group Retail Manager, made the decision to fire Bunting. Neither he nor Barbara Blyth, Citizens Human Resources General Manager, were advised by Burton that Bunting’s conduct was consistent with what was expected of her and other branch notaries, in spite of the fact that Burton participated in the conference call at which the decision to fire Bunting was made. Both Ferretti and Blyth would have considered the practice relevant in deciding whether to terminate Bunting had they known about it.

At the time Bunting was fired, she was participating in the Citizens’ Mid-Atlantic Retail Incentive Plan (the “Plan”). The purpose of the Plan is to reward employees for both team and individual performance when they meet or exceed their performance objectives. Incentive payouts are made quarterly, typically six weeks after the close of the quarter. Citizens has refused to pay Bunting incentive compensation she allegedly earned under the Plan prior to her termination because she was not employed on the day the incentive compensation was determined and allocated to the participants.

#### **STANDARD OF REVIEW**

This Court will grant summary judgment only when no material issues of fact exist, and the

moving party bears the burden of establishing the non-existence of material issues of fact.<sup>2</sup> Once the moving party meets its burden, the burden shifts to the non-moving party to establish the existence of material issues of fact.<sup>3</sup> The Court views the evidence in a light most favorable to the non-moving party.<sup>4</sup> Where the moving party produces an affidavit or other evidence sufficient under Superior Court Civil Rule 56 in support of its motion and the burden shifts, the non-moving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial.<sup>5</sup> If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of the case, then summary judgment must be granted.<sup>6</sup> If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is not appropriate.<sup>7</sup>

### **Discussion**

#### **Count 1 - The Wage Claim**

Bunting's wage claim is based on the Plan. Participants in the Plan are entitled to additional compensation if they meet certain performances objectives. The time periods covered by Bunting's wage claim are the third and fourth calendar quarters of 2004. Bunting was terminated by Citizens on October 29, 2004, approximately one month into the fourth quarter.

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<sup>2</sup>*Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979)

<sup>3</sup>*Id.* at 681.

<sup>4</sup>*Id.* at 680.

<sup>5</sup>*Super. Ct. Civ. R. 56(e); Celotex Corp.*, 477 U.S. 317, 322-23 (1986).

<sup>6</sup>*Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991), *cert. denied*, 112 S.Ct. 1946 (1992); *Celotex Corp.*, 477 U.S. 317 (1986).

<sup>7</sup>*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

Bunting and Citizens agree that any monies due Bunting under the Plan are “wages” within the meaning of 19 Del.C. § 1101(a)(5). The dispute between them is over whether Bunting had “earned” any incentive compensation before she was terminated. Bunting’s position is that she had done all that she was required to do under the Plan up to the day she was terminated. Thus, Bunting claims that she is entitled to incentive compensation for the third quarter and a pro-rata share for the fourth quarter. Citizens argues that Bunting is not due anything because she was terminated before the incentive compensation was calculated and distributed.<sup>8</sup> Eligibility under the Plan is set forth as follows:

To remain eligible to participate in the Plan, employees must be evaluated with a performance rating of at least “Fully Meets Expectations” under the corporate performance evaluation program. Any employee who receives a performance rating of less than “Fully Meets Expectations” will be ineligible to participate in the plan or receive credit for incentives. . . . Any employee on written warning, probation or Performance Improvement Process (PIP) is ineligible to participate in the Plan or to receive credit for incentives during the period of warning or probation.

The Plan lists 12 states where participants forfeit their incentive compensation if they are terminated for cause. However, Delaware is not one of those states. In all of the other states the Plan participants will be paid any earned incentive compensation as defined in the Plan, but forfeit any unearned incentive compensation. The Plan defines an “earned award” as follows:

This plan is intended to support employee incentives and incentives under this plan should not be considered as an entitlement. An incentive award will be deemed earned if, prior to the incentive payout date or the participant’s termination date, whichever occurs first, each of the following has occurred: (a) the participant has taken all necessary actions necessary to complete fully the sale or transaction on which the incentive award is based, (b) the amount of the award is calculable, and (c) the award had been specifically allocated to the participant. Allocation shall be deemed to occur at the end of the performance period and/or funding period, when all data necessary to calculate the award is compiled. For plans in which the determination of awards is

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<sup>8</sup>*Chabot v. Gemcraft Homes Delaware, Inc.*, Del. Super., C.A. 04C-01-020, Graves, J. (Nov. 23, 2005) (Slip-op.).

highly subjective, the payment is not deemed earned until the payout date.

Given the plain language of the Plan and the fact that Bunting was terminated before the incentive compensation for the third and fourth quarters was calculated and allocated, it appears that subsections (b) and (c) of the Plan were not complied with. Therefore, Bunting had not earned any incentive compensation for the third and fourth quarters. Of Course, if it is later determined that Bunting was wrongfully terminated by Citizens, then she would be due incentive compensation if she otherwise meets the Plan requirements.

### **Claim II - The Wrongful Termination Claim**

Bunting's wrongful termination claim is based upon her allegation that Citizens terminated her without cause. Citizens argues that Bunting was an employee-at-will who could be terminated at any time without cause.<sup>9</sup> Citizens also argues that Bunting's failure to follow its written notary policy was "cause" for terminating her. Bunting's response to these arguments is that (1) Citizens only terminated employees for cause, (2) Citizens provided benefits to employees based on years of service, (3) Citizens promoted her to acting branch manager, (4) Citizens had an employee handbook with a progressive disciplinary policy that she relied upon to believe that she would be warned before being terminated for violating the written notary policy, (5) Citizens' and her conduct constituted a bargained-for-exchange where she notarized documents in violation of the written notary policy for the benefit of Citizens and its customers in exchange for Citizens' promise not to fire her for doing so, and (6) Citizens did not have cause to fire her because she complied with Citizens' "actual" notary policy.

Bunting relies upon her first three arguments to suggest that a jury could conclude that Citizens

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<sup>9</sup>*Merrill v. Crothell-American, Inc.*, 606 A.2d 96, 102 (Del. 1992).

enters into contracts with its employees that are intended to endure until an employee does something to give Citizens cause for terminating her. This argument has no basis in law or the facts of this case. These are merely typical employment practices that have co-existed with the employment-at-will doctrine for many years and, based upon the legal authorities cited by the parties, have never been held to be an exception to, or limitation upon, the employment-at-will doctrine. Moreover, Bunting's argument is contrary to Citizens' employee Manual (the "Manual"). As a general rule, an employee manual that does not set forth the terms, conditions, or duration of employment does not constitute an employment contract.<sup>10</sup> Citizens' Manual informs the employees that:

[t]his handbook and the policies contained herein are not intended as and do not create, either expressly or by implication, an employment agreement or any other contractual commitment on the part of Citizens. Any policy of Citizens is subject to change at any time at the sole discretion of Citizens; however, any change in or exception to the citizens' policy of Employment at Will must be made in writing and signed by the Director of Human Resources for Citizens.

The Manual does not provide that Bunting, or any other employee, will be employed for a definite period of time. The Manual also makes it clear that the policies contained therein, which include career opportunities, compensation and employee benefits, are not intended to create an employment agreement and that any change or exception to Citizens' policy of employment-at-will must be made in writing. Therefore, Bunting cannot rely upon Citizens' employment policies and practices to create an employment contract because Citizens never adopted them for that purpose.

As to Bunting's fourth argument, the Manual and branch standards (the "Standards") do have a four-step disciplinary process, starting with a verbal warning and ending with termination. The Manual advises employees that:

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<sup>10</sup>*Heideck v. Kent Gen. Hosp.*, 446 A.2d 1095, 1097 (Del. 1982).

Progression through Performance Improvement Process should be appropriate for the severity of the problem. In certain cases, such as serious misconduct, a written PIP *may* be the first in the performance Improvement Process. *Not all situations require that the manager follow a step-by-step corrective action process. Some circumstances may justify other action up to and including termination.*

The Standards advise employers that:

Due to the nature and seriousness of a loss or exposure, the first, second and third steps may be omitted.

The Manual and Standards make it clear that Citizen's reserves the right to determine the circumstances under which an employee may be terminated without going through the four-step disciplinary process. Given this clear language, Bunting could not have relied upon either the Manual or Standards to believe that she would be warned before being terminated for violating the written notary policy.

As to Bunting's fifth argument, she states that Citizens' and her conduct constituted a bargained-for-exchange where she notarized documents in violation of the written notary policy for the benefit of Citizens and its customers in exchange for Citizens' promise not to fire her for doing so.<sup>11</sup> An employee's at-will status can be modified either by the promissory estoppel doctrine or contract.<sup>12</sup> Bunting's argument is based upon the rather unique facts of this case. Bunting did not unilaterally decide to violate the written notary policy for her benefit. Instead, Bunting was directed by her superiors and others in the branch to notarize documents in violation of the written notary policy for the benefit of Citizens and its customers. The customers benefitted because they were not inconvenienced by having to come to the bank and appear before a notary. Citizens benefitted because

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<sup>11</sup>Corbin on Contracts, § 1.19, at 52 (Rev. Ed. 1993).

<sup>12</sup>Lord v. Souder, 748 A.2d 393, 399 (Del. 2000).

it was able to keep its customers satisfied, thus increasing the likelihood that they would remain customers. Citizens benefitted further from this practice because it allowed Citizens to record mortgages that otherwise were not in recordable form.<sup>13</sup> Both Bunting and Citizens did something that they were not otherwise obligated to do. Bunting performed a task that was not properly a part of her job. Citizens gave up its right to fire Bunting for violating the written notary policy.

Viewing the evidence in the light most favorable to Bunting, a jury certainly could find that Bunting and Citizens entered into a contract modifying her employment-at-will status to provide that in exchange for Bunting notarizing documents in violation of the written notary policy, Citizens would not fire her for doing so. Bunting alleges that it is this contract that Citizens breached when it terminated her for violating the written notary policy. This alleged contract is a modification to Bunting's employment-at-will status. In all other respects, Bunting remained an employee-at-will who could be terminated for no reason at all. However, Citizens could not terminate Bunting for violating the written notary policy. The issue for the jury will be whether such a contract existed. If the jury finds that there was no such contract, then Bunting's claim for wrongful discharge will fail. However, if the jury does find that such a contract existed, then the dispute over whether or not Bunting's termination was for cause is irrelevant because this is what Citizens bargained away. Thus, there is no need for me to address Citizens' termination for cause argument and Bunting's response to it.

### **Claim Three - Good Faith and Fair Dealing Claim**

Bunting's breach of the implied covenant of good faith and fair dealing claim is based upon Citizens' alleged motive for terminating her and the manner in which Citizens made the decision to terminate her. Citizens argues that Bunting's claim fails because it does not fall within any of the four

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<sup>13</sup>25 *Del.C.* §2101.

exceptions to the employment-at-will doctrine.<sup>14</sup> These exceptions are (i) where the termination violated public policy; (ii) where the employer misrepresented an important fact and the employee relied “thereon either to accept a new position or remain in a present one;” (iii) where the employer used its superior bargaining power to deprive an employee of clearly identifiable compensation related to the employee’s past service; and (iv) where the employer falsified or manipulated employment records to create fictitious grounds for termination.<sup>15</sup> Bunting’s response is that her claim does fall into the last two exceptions because (1) Citizens terminated Bunting to keep her from getting the incentive compensation that she earned under the Plan, and (2) Burton did not tell Ferretti and Blyth that Bunting was merely following the branch’s accepted notary practices when she notarized the mortgage given to her by Craig.

As to Bunting’s first allegation, even when viewing the facts in the light most favorable to her, the only reasonable conclusion is that Citizens terminated Bunting because she violated the written notary policy. There is simply no evidence at all to support Bunting’s claim that Citizens terminated her to avoid paying incentive compensation to her. While Citizens was concerned about a loss in the event the customer did not repay the loan, there is not evidence that Citizens tried to recover this loss by not paying incentive compensation to Bunting.

As to Bunting’s second allegation, it is true that Burton did not tell Ferretti and Blyth that Bunting was merely following the long-established branch notary practice when they made the decision to fire Bunting. Burton also did not tell Ferretti and Blyth that she, Walls and others had directed Bunting to notarize signatures on documents that she had not actually witnessed. Burton also did not

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<sup>14</sup>*Lord v. Souder*, 748 A.2d 393, 400 (Del. 2000).

<sup>15</sup>*Id.*

tell Ferretti and Blyth that other notaries in the branch had been directed to do the same thing and that the practice had gone on for many years and that she and Walls had done nothing to stop it. Bunting suggests that Burton intentionally did not disclose this information because she didn't want to jeopardize her own career. While it may be true that Burton told Ferretti and Blyth that Bunting should only be given a warning, Burton had to know the importance to Ferretti and Blyth as to the actual notary practice at the branch and that it had been encouraged and condoned for many years by management, both on a branch and regional basis. There is no doubt that Burton's lack of candor left Ferretti and Blyth with the impression that Bunting's actions were isolated and of a type and nature not known to management. In any event, Burton ultimately knew for certain how important her non-disclosures were because she carried out Ferretti's order to terminate Bunting and did nothing to remedy the situation. Citizens' failure to do anything differently after learning of Burton's deceit can be viewed as a ratification of her actions. Viewing the evidence in the light most favorable to Bunting, a jury could certainly view Burton's failure to describe the actual branch notary practice for Ferretti and Blyth as an intentional effort by Burton to manipulate Bunting's employment records to create fictitious grounds for termination, particularly since Burton had directed Bunting to violate the notary policy and had never told her not to do it again.

### **Conclusion**

Bunting's motion for partial summary judgment as to Count I is denied. Citizens' motion for partial summary judgment as to Count II is granted for Bunting's wrongful termination claim based on Citizens' employment policies, Manual and Standards. It is denied in all other respects. Citizens' motion for partial summary judgment as to Count III is granted for Bunting's breach of the covenant of good faith and fair dealing claim based on Bunting's allegation that Citizens terminated her to avoid

paying incentive compensation to her. It is denied in all other respects.<sup>16</sup>

IT IS SO ORDERED.

Very truly yours,

E. Scott Bradley

cc: Prothonotary

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<sup>16</sup>Bunting has conceded that she is not entitled to damages for emotional and physical distress.